NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

NOEL D. McNEEL, JOYCE A. McNEEL,
WILLIAM KURNIK, NANCY KURNIK,
WILLIAM I. PRESSLEY

PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit Court of Appeals exceeded the standard of review of the Tax Court's grant of the Commissioner's Motion to Dismiss for Failure to State a Claim when the Court found facts not alleged in the Petition or that could not be inferred from the Petition?

2. Whether in exceeding its standard of review, the Ninth Court overlooked facts alleged in the Petition that would prove Petitioners' claim that their labor is received as a gift from their Creator and the gift of the labor is a gift for income tax purposes and as such is a gift for purposes of Internal Revenue Code (IRC), § 1015(a)?

THE PARTIES

The only parties are those who appear in the caption of the case.

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The Petitioners, Noel D. McNeel and Joyce A. McNeel (McNeels), hereby Petition this Court for its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on January 30, 1995. The Petitioners, William Kurnik and Nancy Kirnik (Kurniks), hereby Petition this Court for its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on November 3, 1995. The Petitioner William I. Pressley (Pressley) hereby Petitions this Court for its Writ of Certiorari to review the judgment of the Ninth Circuit entered in this action on November 22, 1995.

OPINION OF THE COURT BELOW

The decisions of the Ninth Circuit Court of Appeals for all Petitioners were unpublished [App., McNeels Pgs. A-1 to A-2; Kurniks Pgs. B-1 to B-2; and Pressley, Pgs. C-1 to C-2].[1] The opinions of the United States Tax Court for the McNeels was published as TCM 1995-211 and is in the Appendix [App., Pgs. A-3 to A-12]. The opinions of the United States Tax Court for the Kurniks and Pressley were unpublished and are in the Appendix [Kurniks, Pgs. B-5 to B-10; Pressley, Pgs. C-5 to C-8].

JURISDICTION

The Ninth Circuit Court of Appeals entered judgment in McNeel on January 30 1996 [App., Pgs. A-1 to A-2], in Kurnik on November 3, 1995 [App., Pgs. B-1 to B-2] and in Pressley on November 22, 1995 [App., Pgs. C-1 to C-2]

1/ The Appendix is divided into Appendix A for the McNeels, Appendix B for the Kurniks and Appendix C. for Pressley. References to pages will be A-(page #) for the McNeels, B-(Page #) for Kurniks and C-(Page #) for Pressley. Appendix D contains the statutes and rules discussed in the petition.

affirming the Tax Court's dismissal for failure to state a claim. On December 14, 1995, the Kurniks filed their Petition for Rehearing. On January 29, 1996, the Ninth Circuit denied the Kurniks' Petition for Rehearing. [App., Pg. B-3]. On January 4, 1996, Pressley filed his Petition for Rehearing. On April 15, 1996, the Ninth Circuit denied Pressley's Petition for Rehearing. [App., Pg. C-3] The jurisdiction of this Court to review the judgment of the Ninth Court of Appeals by writ of certiorari is invoked under the provisions of 28 USC, § 1254(1) and IRC, § 7482(a).

STATUTORY PROVISIONS INVOLVED

The following statutes and rules are involved in this petition.[2] The text of each provision is found in Appendix D. IRC, § 61; IRC, § 83; IRC, § 165; IRC, § 1001; IRC, § 1011; IRC, § 1012; IRC, § 1015(a); Rule 40, Rules of Practice and Procedure, *UNITED STATES TAX COURT*; Revenue Act of 1921, P.L. 67-98, Chapter 136, § 202(a)(2), 42 Stat 229; Comment on § 202(a)(2) of Revenue Act of 1921, Senate Report 275, Page 10-11

STATEMENT OF THE CASE AND FACTS FOR McNEEL

During the year 1992, Petitioner Noel D. McNeel sold his labor under contract to various construction companies and Petitioner Joyce A. McNeel sold her labor under contract to Luby's Cafeterias, Inc. The McNeels received a combined total of $30,310.00 for the sale of that labor. [TCP[3], ¶ 6(o); App. Pg. A-6 and Pg. A-16].

2/ All references to the statutes are found in the Internal Revenue Code of 1986 unless otherwise noted.

3/ TCP refers to the Petition filed in the United States Tax Court. The Petition for the McNeels is found in Appendix A, Pages A-13 through A-17, inclusive. The Petition for the Kurniks is found in

The money the McNeels received during the year 1992 was not "wages" (remuneration for services) or "compensation for services." [TCP, ¶ 6(p); App., Pgs. A-7 and A-16]. During the year 1992 neither of them were employees of the companies they worked for nor were they engaged in employment nor did the provide no services to the companies they worked for. They merely sold their labor under contract. [TCP, ¶ 6(a); Pgs. A-6 and A-14]. During the year 1992, the McNeels were not otherwise engaged in any profession, trade, employment or vocation or any business upon which an income tax can be imposed. [TCP, ¶ 6(b); App., Pgs. A-6 and A-15]

Petitioner Noel D. McNeel is a Man created by God Almighty. Petitioner Joyce A. McNeel is a Woman created by God Almighty. The McNeel's Life is given to them each day as an endowment (gift) from God. The labor of the McNeels' labor is their property. As a part of their Life they receive their labor as a day to day gift from their Creator. The gift of McNeels' labor is a gift for income tax purposes. The property was received by the McNeels after December 31, 1920. The McNeels' Creator is the original owner of this property and their Creator did not receive the property as a gift before giving it to them. The McNeels have been unable to discover the basis (cost) their Creator had in the labor at the time it was given to them as a gift. [TCP, ¶¶ 6(c) through 6(k); App., Pgs. A-7 and A-15]

On September 22, 1994, the Appellee (hereinafter Commissioner) issued Notices of Deficiency for the year 1992. [App., Pg. A-5]. The Notices set forth deficiencies for Noel D. McNeel for the year 1992 of $1,481.00 and deficiencies for Joyce McNeel for the year 1992 of

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Appendix B, Pages B-11 through B-19, inclusive. The Petition for Pressley is found in Appendix C, Pages C-9 through C-13, inclusive. Appendix D contains the statutes and rules involved in this case.

$1,481.00, plus penalties and interest for both. [App. Pgs. A-5 to A-6]. The Deficiencies were based upon erroneous the presumption that the Petitioners had a **ZERO** basis (cost) in the labor they sold during the year 1992. [App., Pg. A-14].[4] Based upon this erroneous conclusion, probably in part on the erroneous W-2's and 1099's that declared that the McNeels were paid "Wages" or "Compensation for Services," the Commissioner determined that all of the monies received by the Petitioners for the sale of their labor during the year 1992 constituted "Wages" or "Compensation for Services."

On or about December 21, 1994, the Petitioners filed their formal petition in this action [App., Pg. A-6]. The McNeels alleged that the Commissioner erred in proceeding as if the McNeels had a **ZERO** basis (cost) in their labor for the year 1992 [TCP, ¶ 5(d); App., Pg. 14]. As they are set forth above, the McNeels then set down sufficient facts for their claim that they had a basis (cost) in their labor that was at least equal to the **FAIR MARKET VALUE** of the labor they sold during the year 1992.

On February 15, 1995, the Commissioner filed a Motion to Dismiss for Failure to State a Claim upon which Relief could be Granted [App., Pg. A-8]. The Commissioner argued that the Court's have repeatedly rejected the notion that one can have a basis (cost) in one's own labor. The Commissioner cited 4 cases that had nothing to do with determining whether one had a basis (cost) in one's labor. On May 17, 1995, the Tax

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4/ This presumption of a **ZERO** basis (cost) is an unsupported conclusion made by the authors of two Congressional Research Service (CRS) Reports. See *Some Constitutional Questions Regarding the Federal Income Tax Laws*, Report No. 84-168A, by Howard Zaritsky, Updated by John R. Lucky (1984), Chapter 5, Page 11); *Frequently Asked Questions Concerning the Federal Income Tax*, Report 92-303 A, John R. Luckey (1992), Chapter 7, Page 12.

Court issued a memorandum opinion and stated that an Order of Dismissal and Decision would be entered [App., Pgs. A-5 through A-12, inclusive]. The Tax Court acknowledged the facts alleged by the McNeels in their Petition. [App., Pgs. A-6 and A-7]. However, the Court proceeded to ignore those allegations and repeatedly referred to or proceeded as if the amounts the McNeels received were "Wages" or "Compensation for Services." [App., Pgs. A-6, A-10 and A-12] contrary to the allegations in the Petition. The Court then entered its Order of Dismissal and Decision on May 18, 1995. [App., Pg. A-3 to A-4].

The Ninth Circuit entered its judgment on January 30, 1996 affirming the Tax Court's dismissal. Like the Tax Court the Ninth Circuit referred to or proceeded as if the amounts the McNeels received were "Wages" or "Compensation for Services." [App., Pg. A-2]. It is the January 30, 1996 decision of the Ninth Circuit Court of Appeals for which McNeels seek review in this Court by certiorari.

STATEMENT OF THE CASE AND FACTS FOR KURNIK

During the year 1985, William Kurnik sold his labor to the public in the management and maintenance of his Laundromat. For that labor, the public paid for use of the machines and William Kurnik received $44,782.00. [TCP, ¶ 6(m); App., Pg. B-16]. During the year 1986, William Kurnik sold his labor to the public in the management and maintenance of his Laundromat. For that labor the public paid for use of the machines and William Kurnik received $36,324.00. [TCP, ¶ 6(n); App., Pg. B-16]. During the year 1986, William Kurnik sold his labor to Response Communications Inc. and Walker Research Inc. For that labor he received $449.00. [TCP, ¶ 6(o); App., Pg. B-16]. During the year 1987, William

Kurnik sold his labor to the public in the management and maintenance of his Laundromat. For that labor the public paid for use of the machines and William Kurnik received $27,082.00. [TCP, ¶ 6(p); App., Pg. B-17]. During the year 1988, William Kurnik sold his labor to the public in the management and maintenance of his Laundromat. For that labor the public paid for use of the machines and William Kurnik received $45,667.00. [TCP, ¶ 6(q); App., Pg. B-17]. During the year 1989, William Kurnik sold his labor to the public in the management and maintenance of his Laundromat. For that labor the public paid for use of the machines and William Kurnik received $37,293.00. [TCP, ¶ 6(r); App., Pg. B-17]

During the year 1985, Nancy Kurnik sold her labor to Hi-Health Supermarket Corp. From Hi-Health she received $482.00 for the sale of that labor. [TCP, ¶ 6(s); App., Pg. B-17]. During the year 1987, Nancy Kurnik sold her labor to Fry's Food Stores. From Fry's she received $14,569.00 for the sale of that labor. [TCP, ¶ 6(t); App., Pg. B-17]. During the year 1988, Nancy Kurnik sold her labor to Fry's Food Stores. From Fry's she received $20,692.00 for the sale of that labor. [TCP, ¶ 6(u); App., Pg. B-18]

The amounts received by the Kurniks from the management and maintenance of the Laundromat and from Hi-Health or Fry's Food were not "Wages" or "Compensation for Services" or "Non-Employee Compensation. [TCP, ¶ 6(v); App., Pg. B-18]. The Kurniks were not employees, or engaged in employment or self-employment. They merely sold their labor for the money they received. [TCP, ¶ 6(w); App., Pg. B-18]

The Kurniks' labor is their property. [TCP, ¶ 6(e); App., Pg. B-15]. As a part of their life they receive their labor as a day to day gift from their Creator. [TCP, ¶ 6(f); App., Pg. B-15]. The property was received by the

Kurniks after December 31, 1920. [TCP, ¶ 6(g); App., Pg. B-15]. The Kurniks' Creator is the original owner of this property and their Creator did not receive the property as a gift before giving it to the Petitioners. [TCP, ¶ 6(h); App., Pg. B-15]. The Kurniks have been unable to discover the basis (cost) their Creator had in the labor at the time it was given to them as a gift. [TCP, ¶ 6(i); App., Pg. B-15]

On March 22, 1994, the Appellee (hereinafter Commissioner) issued a Notice of Deficiency for the years 1985 through 1989 for William Kurnik and 1985 and 1987 through 1989 for Nancy Kurnik. [App., Pgs., B-5 and B-11]. The Deficiency in taxes determined for William Kurnik for the year 1985 is $6,129.00; for the year 1986 is $10,886.00; for the year 1987 is $4,212.00; for the year 1988 is $8,367.00; and, for the year 1989 is $4,670.00. The Deficiency in taxes determined for Nancy Kurnik for the year 1985 is $1,511.00; for the year 1987 is $1,894.00; for the year 1988 is $4,205.00; and, for the year 1989 is $1,207.00. [App., Pgs. B-6, B-7, B-12 and B-13].

The Deficiencies were based upon erroneous the presumption that William Kurnik had a **ZERO** basis (cost) in the labor he sold in his management and maintenance of the Laundromat and to Response Communications, Inc. and Walker Research, Inc. during the years 1985 through 1989 and that Nancy Kurnik had a **ZERO** basis (cost) in the labor she sold to Hi-Health Supermarket Corporation and Fry's Food Stores during the years 1985 through 1989. [TCP ¶ 5(e) through 5(l); App., Pgs. B-13 and B-14].[5] Based upon this erroneous conclusion, probably in part on the erroneous 1099's that declared that the Petitioners were paid "Wages" or "Compensation for Services," the Commissioner deter-

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5/ See Footnote 4, supra.

mined that all of the monies received by the Kurniks for the sale of their labor during the years 1985 through 1989 constituted "Wages" or "Compensation for Services."

On or about August 26, 1994, the Kurniks filed their petition in this action. [App., Pg. B-7]. The Kurniks alleged that the Commissioner erred in proceeding as if the Petitioners had a **ZERO** basis (cost) in their labor [CR 3, ¶ 5(e) through (l); App., Pgs., B-13 and B-14]. As set forth above, the Kurniks set down facts for their claim that they had a basis (cost) in their labor that was at least equal to the **FAIR MARKET VALUE** of the labor they sold in the management and maintenance of the Laundromat, to Response Communications, Inc. and Walker Research, Inc. and to Hi-Health Supermarket Corporation and Fry's Food Stores.

On September 22, 1994, the Commissioner filed a Motion to Dismiss for Failure to State a Claim upon which Relief could be Granted. [App., Pg. B-5]. The Commissioner argued that the Court's have repeatedly rejected the notion that one can have a basis (cost) in one's own labor. The Commissioner cited 4 cases that had nothing to do with determining whether one had a basis (cost) in one's labor. On September 29, 1994, the Court ordered the Kurniks to respond to the Motion to Dismiss, to file a second amended Petition and set oral argument on the Motions Calendar, in Washington, D.C. on November 2, 1994 [App., Pg. B-7]. On or about October 25, 1994, the Kurniks responded to the Motion to Dismiss and submitted their statement in lieu of appearance. [App., Pgs. B-7 and B-8].

The Tax Court granted the Commissioner's Motion to Dismiss on December 7, 1994. [App., Pgs. B-5 through B-10, inclusive]. The Court proceeded to ignore the allegations in the Petition and repeatedly referred to or proceeded as if the amounts the Kurniks received were "Wages" or "Compensation for Services" and stated that

the Kurniks were proceeding on the "flawed theory that they have a fair market value basis in their labor. This argument was soundly rejected by the Court in Abrams v. Commissioner, 82 TC 403, 407-08 (1984) and Rowlee v. Commissioner, 80 TC 1111, 1119-20." [App., Pgs. B-8]

On November 3, 1995, the Ninth Circuit affirmed the Tax Court's dismissal. Like the Tax Court the Ninth Circuit referred to or proceeded as if the amounts the Kurniks received were "Wages" or "Compensation for Services." [App., Pg. B-2]. It is the November 3, 1995 decision of the Ninth Circuit Court of Appeals for which Kurniks seek review in this Court by certiorari.

STATEMENT OF THE CASE AND FACTS FOR PRESSLEY

During the year 1987, William Pressley sold his labor to John Ball & Partners, Mathews, Kessler & Assoc., Integrated Design and Neywell, Inc. each day that he worked. For the year 1987 he received a total of $ 26,677.00 for the sale of his labor to each of the above named companies. [TCP, ¶ 6(o); App., Pg. C-12]. During the year 1988, William Pressley sold his labor to John Ball & Partners and Honeywell, Inc. on each day that he worked. For the year 1988 he received a total of $ 8,287.00 for the sale of his labor to each of the above named companies. [TCP, ¶ 6(p); App., Pg. C-12]. During the year 1989, William Pressley sold his labor to Honeywell, Inc.. on each day that he worked. For the year 1989 he received $ 4,121.00 for the sale of his labor to each of the above named companies. [TCP, ¶ 6(q); App., Pg. C-12]

William Pressley is a Man created by God Almighty. [TCP, ¶ 6(e); App., Pg. C-11]. His Life is given to him each day as an endowment (gift) from his Creator. [TCP, ¶ 6(f); App., Pg. C-11]. William Pressley's labor is his property. [TCP, ¶ 6(g); App., Pg. C-11]. As a part of his

life he receives his labor as a day to day gift from his Creator. [TCP, ¶ 6(h); App., Pg. C-11]. The property was received by William Pressley after December 31, 1920. [TCP, ¶ 6(i); App., Pg. C-11]. William Pressley's Creator is the original owner of this property and his Creator did not receive the property as a gift before giving it to William Pressley. [TCP, ¶ 6(j); App., Pg. C-11]. William Pressley has been unable to discover the basis (cost) his Creator had in the labor at the time it was given to him as a gift. [TCP, ¶ 6(k); App., Pg. C-11]. The Secretary has either failed to determine the basis (cost) in William Pressley's labor as required by Internal Revenue Code (IRC), § 1015(a) or has been unable to determine the basis (cost) that his Creator had in the gift of the labor was given to William Pressley. [TCP, ¶ 6(l); App., Pg. C-11]. If the Secretary is unable to determine the basis (cost) of William Pressley's labor that was received as a gift, the Secretary must proceed as if the basis (cost) is the "**FAIR MARKET VALUE**" of the property based upon the best information available to him. [TCP, ¶ 6(m); App., Pg. C-12]. The only information that would be available to the Secretary to determine the basis (cost) William Pressley had in his labor would be the amount he received each day he sold his labor. [CR 3, ¶ 6(n); App., Pg. C-12]

On May 13, 1994, the Commissioner issued a Notice of Deficiency for the years 1987, 1988 and 1989. [App. Pg. C-5]. The Notices set forth deficiencies in the amount of $10,107.00 (1987), $1,653.00 (1988) and $537.00 (1989) plus penalties and interest. [App., Pg. C-5]. The Deficiencies were based upon the presumption that William Pressley had a **ZERO** basis (cost) in his labor he sold to John Ball & Partners, Mathews, Kessler & Assoc., Integrated Design, Neywell, Inc. and Honeywell, Inc.[6]

6/ *See Footnote 4, supra.*

Based upon this erroneous conclusion, based in part on the erroneous 1099's issued by each of the above companies, which declared that the William Pressley was paid "Wages" or "Compensation for Services," the Commissioner determined that all of the monies received by William Pressley for the sale of his labor during the years 1987, 1988 and 1989 constituted "Wages."

On October 14, 1994, Pressley filed his formal petition in this action. [App., Pg. C-6]. Pressley alleged that the Commissioner erred in proceeding as if Pressley had a **ZERO** basis (cost) in his labor [TCP, ¶¶ 5(d), (e) and (f); App., Pg. C-10]. The Pressley then alleged the facts in ¶ 6(e) through ¶ 6(q) for his claim he had a basis (cost) in his labor that was at least equal to the **FAIR MARKET VALUE** of the labor he sold each day that he worked during the years 1987, 1988 and 1989. [App., Pg. C-11 and C-12]

On December 2, 1994, the Commissioner filed a Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted. [App., Pg. C-5]. The Commissioner argued that the Court's have repeatedly rejected the notion that one can have a basis (cost) in his labor. The Commissioner cited 4 cases that had nothing to do with determining whether one had a basis (cost) in one's labor. On December 7, 1994, the Court ordered the Pressley to respond to the Motion to Dismiss and set a hearing on the Motion for January 11, 1994. [App., Pg. C-6]. On January 3, 1995, the Pressley responded to the Motion to Dismiss and submitted a statement in lieu of appearance. [App., Pg. C-6 and C-7). On January 11, 1995, the Tax Court held its hearing on the Commissioner's Motion. [App., Pg. C-6]. On January 20, 1995, the Tax Court granted the Commissioner's Motion and entered its Order of Dismissal and Decision. [App., Pg. C-5 through C-8, inclusive.] The reasoning for the dismissal was that the Petitioner's claim that he had a

basis (cost) in his labor that is at least equal to the **FAIR MARKET VALUE** of the labor "amounted to nothing more than time-worn tax protester rhetoric. Petitioner's theory that he has a fair market value basis in his labor was soundly rejected by this Court in Abrams v. Commissioner, 82 TC 403, 407-08 (1984) and Rowlee v. Commissioner, 80 TC 1111, 1119-20." [App., Pg. C-7]

On November 22, 1995, the Ninth Circuit affirmed the Tax Court's dismissal. Like the Tax Court the Ninth Circuit referred to or proceeded as if the amounts Pressley received were "Wages" or "Compensation for Services." [App., Pg. C-2]. It is the November 22, 1995 decision of the Ninth Circuit Court of Appeals for which Kurniks seek review in this Court by certiorari.

REASONS FOR GRANTING WRIT & ARGUMENT

1. THE APPELLATE COURT'S FINDINGS OF FACT THAT WERE NOT IN THE PLEADINGS WHEN IT AFFIRMED THE TAX COURT'S DISMISSAL ON THE COMMISSIONER'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH SEVERAL RELEVANT DECISIONS OF THIS COURT. In reviewing a decision of the Tax Court that dismisses a Motion to Dismiss for Failure to State a Claim, the appellate court's review is limited to the allegations in the Petition and the Court of Appeals, like the trial court, must assume that the facts plead in the Petition are true. In the instant case the Commissioner moved to dismiss each of the Tax Court Petitions on the ground that the Petitions Failed to State a Claim upon which Relief could be Granted. The Tax Court disposed of them, holding as justification for the imposition of sanctions, that the McNeels "contention that wages do not constitute income

has been consistently and uniformly rejected, for many years, by both this and other Federal Courts" [App., Pg. A-12], that the Kurniks' "continue to proceed on the flawed theory that they have a fair market value basis in their labor" [App., Pg. B-8] and that Pressley's "theory that he has a fair market value basis in his labor was soundly rejected by this Court..." [App., Pg. C-7]. All the authorities relied upon by the Tax Court arose from taxpayer claims that "Wages are not income." A claim that has never been raised by any of the Petitioners before this Court.[7]

In affirming the Tax Court, the Ninth Circuit only compounded the problem when it found facts that were never plead in any of the Petitions or the Ninth Circuit relied upon decisions that involved "Wages are not income claims." In each case this meant that the Ninth Circuit had to find that the Petitioners received "Wages" or "Compensation for Services." Then based upon those facts applied the "Wages are income" conclusion of law that is irrelevant to the case at hand. The Ninth Circuit in McNeel made the following findings:

> The McNeels contend that the **compensation** they received from their **employers** is not taxable because their labor is equal to the amount of **compensation** they received. The tax court properly rejected this frivolous contention. [App., Pgs. A-1 to A-2] (emphasis added)

7/ In each case, the Petitioners conceded before the Tax Court, and the Court of Appeals, that "Wages" or "Compensation for Services" were in fact includible in gross income. The Petitioners also concede that as a matter of law "Wages" or "Compensation for Services" are includible in gross income.

The Ninth Circuit in Kurnik made the following findings:

> The Kurniks contend that their income for the relevant years is not taxable as "wages" within the meaning of the Internal Revenue Code, because the Code fails to consider the fair market value of the basis of their labor as a gift from their creator, and the Kurniks can show that their basis in their labor is equal to the amount of income received. The tax court properly rejected this frivolous contention. [App., Pgs. B-2]

The Ninth Circuit in Pressley made the following findings:

> Pressley contends that the income for the relevant years is not taxable as "wages" within the meaning of the Internal Revenue Code, because the Code fails to consider the fair market value of the basis of his labor, as a gift from his creator and he can show that his basis in his labor is equal to the amount of income received. The tax court properly rejected this contention. [App., Pgs. B-2]

In each case the Ninth Circuit relied upon *Carter v. Commissioner*, 784 F.2d 1006, 1009 (9th Cir., 1986); *Olson v. United States*, 760 F.2d 1003, 1005 (9th Cir., 1985). Both cases involved taxpayer claims that their "Wages are not income." While the Ninth Circuit only used the term "compensation" and "employer" in McNeel, the authorities of *Carter* and *Olson*, supra, which were relied upon in all three cases can only lead to the inescapable conclusion that the Ninth Circuit found that the Kurniks and Pressley likewise received "Wages" or "Compensation for Services."

If the Courts are correct and "Wages" or "Compensation for Services" are includible in gross

income as a matter of law, then whatever "Wages" or "Compensation for Services" are or are not must be decided as a question of fact. There must be a basis in the Internal Revenue Laws to determine when one does or does not **in fact** receive"Wages" or "Compensation for Services." As the Petitioner's will discuss in Argument 2, infra, the law does make just such a provision.

The Ninth Circuit's conclusions missed the point and in doing so incorrectly found that or proceeded as if the Petitioners had in **fact** received "wages," "rendered services" or were "employees." The Ninth Circuit cannot find or proceed on facts that are directly contrary to the facts plead in the Petitions in each case and certainly cannot apply prior decisions that require reliance on facts that are contrary to the facts plead in the petition. No claim or allegation in the Tax Court Petition alleged that the money the Petitioners received was "wages" or "compensation" or that the Petitioners "rendered services" as "employees" for an "employer."

The Ninth Circuit could not find, rely or proceed on these facts unless they were affirmatively plead. The facts were not affirmatively plead and no inference to these facts could be drawn, since all three Tax Court Petitions specifically alleged that the amounts they received were not "Wages" or "Compensation for Services" and that they were not employees, engaged in employment or self-employment. In light of the limitations imposed upon the Ninth Circuit to review the dismissal by the Tax Court, it cannot be more clear that the Ninth Circuit exceeded its standard of review and found or proceeded on facts that directly contradicted facts plead in the Petition. What is at issue in the instant cases is not whether "wages" are or are not includible in gross income, but whether the Petitioners received "Wages" or "Compensation for Services" and whether any Court in this country can declare as a

matter of law that "wages" or "compensation" are received simply because someone works for someone else and sells his labor under contract. Simply put, whether Petitioners received "wages" or "compensation for services," were "employees" or "rendered services" are issues of fact, not a questions of law to be decided in a motion to dismiss.

The Commissioner challenged the Petitioners' claim that their labor is their property, that it is a gift from their Creator and is a gift for income tax purposes, at the pleading stage, by her Motion to Dismiss. Because the facts were not challenged in any other way (by way of summary judgment, for example) this court must assume they are true. *Fla. Gen. Contractors v. Jacksonville*, 508 US _____, 124 L.Ed.2d 586, 599, 113 S.Ct. _____, (1993), citing *Lucas v. South Carolina Coastal Council*, 506 US __ __, _____, n.3, 120 L.Ed. 798, 810-11, n.3, 112 S.Ct 2886 (1992); *Pennell v. San Jose*, 485 US 1, 7, 99 L.Ed.2d 1, 108 S.Ct 849 (1988). Given that presumption and this Court's standard of review, it was inappropriate for the Ninth Circuit to have affirmed the Tax Court's grant of the Motion to Dismiss and to find or proceed on facts that were not plead and that could not otherwise be inferred from the pleadings.

2. THE NINTH CIRCUIT'S JUDGMENT IGNORED THE PETITIONERS' CLAIM THAT THEIR LABOR, WHICH IS RECEIVED AS A GIFT FROM THEIR CREATOR, IS A GIFT FOR INCOME TAX PURPOSES AND AS SUCH IS A GIFT FOR IRC, § 1015(a), AND THUS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. FURTHERMORE, BECAUSE THE ISSUE OF WHETHER THERE HAS BEEN A GIFT FOR INCOME TAX PURPOSES IS A

QUESTION OF FACT, THE NINTH CIRCUIT HAS DECIDED AN ISSUE OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH SEVERAL APPLICABLE DECISIONS OF THIS COURT. As the Tax Court Petitions in all three cases allege, the Petitioners contend that the Commissioner erred in proceeding as if the Petitioners had a **ZERO** basis (cost) in the labor that they sold for the relevant years at issue. The Petitioners alleged facts that if proven would establish that they had a basis (cost) at least equal to, if not greater than, the **FAIR MARKET VALUE** of the labor they sold during the relevant years.

The Respondent asserts the **ZERO** basis (cost) in one's labor as a conclusive, but unsupported presumption. See *Some Constitutional Questions Regarding the Federal Income Tax Laws*, Congressional Research Service Report No. 84-168A, by Howard Zaritsky, Updated by John R. Lucky (1984), Chapter 5, Page 11; *Frequently Asked Questions Concerning the Federal Income Tax*, Congressional Research Service Report No. 92-303 A, by John R. Luckey (1992), Chapter 7, Page 12.

It has long been recognized by this Court that a Man's labor, energies and talents are his property and that this property is a gift from his Creator. *Butcher's Union Co. v. Crescent City Co.*, 111 US 746, 756-57, 28 L.Ed. 585, 4 S.Ct. 652 (1884). Quoting first from the *Unanimous Declaration of the thirteen united States of America* (Commonly referred to as the Declaration of Independence) and then from *Adam Smith's, Wealth of Nations*, Book I, Chapter 10 this Court discussed the nature of this "gift."

> As in our intercourse with our fellow-men, certain principles of morality are **ASSUMED TO EXIST**, without which society would be impossible, so certain **INHERENT RIGHTS** lie at the

foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: "We hold these truths to be self evident" -- this is so plain that their truth is recognized upon their **MERE** statement -- "that all men are **ENDOWED**" -- **NOT** by edicts of Emperors, or decrees of Parliament, or **ACTS OF CONGRESS**, but -- "by their **CREATOR** with certain unalienable rights" -- that is rights which cannot be bartered away, or given away, or taken away, except in punishment of crime -- "and that among these are life, liberty, and the pursuit of happiness, and to secure them" -- not grant but secure them -- "governments are instituted among men, deriving their just powers from the consent of the governed." (*emphasis added*)
Butcher's Union, supra, at 756

"The **PROPERTY** which every man has, in **HIS OWN LABOR** as it is the **ORIGINAL FOUNDATION** of **ALL OTHER PROPERTY**, so it is the most **SACRED** and inviolable." (*emphasis added*). *id.* at 757

Ultimately the basis (cost) the Petitioners have in their labor is determined after establishing whether the gift of this labor is a gift for income tax purposes. No Court has ever addressed whether the gift of Man's labor is a gift for income tax purposes. Whether there has been a gift for income tax purposes requires a "detached and disinterested generosity" on the part of the giver *Commissioner v. Duberstein*, 363 US 278, 285, 4 L.Ed. 1218, 80 S.Ct. 1150 (1960) and is decided as a question of fact *Duberstein*, supra, 289-91. Suffice it to say that the Ninth Circuit's refusal to address the issue leaves no

doubt that they intend to proceed as if it is a question of law that can be disposed of in a Motion to Dismiss, in conflict with the applicable decisions of this Court.

Assuming sufficient facts are presented, the Tax Court will have no alternative but to find that the gift of Petitioners' labor is a gift for income tax purposes. However, the presentation of evidence and findings of fact must first be made in the trial Court. On remand to the Ninth Circuit and then to the Tax Court, should it be found that Petitioners' labor, which is indisputably received as a gift from their Creator, **is in fact** a gift for income tax purposes, then the Tax Court would have no alternative but to find that the gift of Petitioners' labor is a gift under provisions of IRC, § 1015(a), which would then control the procedures for determining the basis (cost) the Petitioners have in their labor.

There is nothing in the language of the statute or the legislative history of § 1015(a)[8] to show that Congress excluded from the operation of the statute an intangible gift such as a Man's labor. In light of the principle that the Petitioners are exempt from taxation in the absence of clear and unequivocal language, *Spreckles Sugar Ref. Co. v. McClain*, 192 US 397, 48 L.Ed. 496, 24 S.Ct. 376 (1904), the Petitioners' construction of IRC, § 1015 is more than reasonable.

8/ What is now IRC, § 1015(a) was added to the Internal Revenue Laws by the Revenue Act of 1921, P.L. 67-98, Chapter 136, § 202, 42 Stat. 229 in response to donees selling gifts using the market value of a gift at the time the gift was given to the donee instead of using the market value of gift at the time it was acquired by the donor who did not receive it as a gift. Under the previous rule, the recipient of the gift used the market value as of the date of receipt of the gift and by selling it at that price, the end result was no gain. The text of the original enactment from the Revenue Act of 1921 and the comments from Senate Report No. 275 are included in the Appendix Page D-5 and D-6.

Within the provisions for deductions permitted under IRC, §§ 161 through 196, the amount of any loss that can be deducted is the adjusted basis under IRC, § 1011. See IRC, §§ 83 and 165(b). In addition to the other deductions this loss would be calculated as A - C = I. A being the amount of the receipts, C being the cost and I, without considering any other deductions being the resulting income. Since "Wages" are includible in gross income, in determining the amount of "Wages" or "Compensation" that would be includible in gross income, it is only necessary to substitute the I with a W and use the following formula. A - C = W

- A refers to the amount received for the sale of labor
- C refers to the cost or basis in the labor
- W refers to the amount that would be considered "Wages" or "Compensation for Services" which would then be includible in gross income.

Once the adjusted basis (cost) in the Petitioners' labor is calculated under the applicable provisions of IRC, §§ 1001, 1011, 1012 and 1015 and because the transaction at issue deals with the sale or disposition of property, the Petitioners are entitled to arrange their affairs under the provisions of IRC, § 61(a)(3) "Gains derived from dealings in property." *United States v. Cumberland P.S. Co.*, 338 US 451, 94 L.Ed. 251 70 S.Ct 380 (1950); *Gregory v. Helvering*, 293 US 465, 79 L.Ed. 596, 55 S.Ct. 266 (1935). Furthermore, under the provisions of IRC, § 165(b), the Petitioners are entitled to deduct their basis (cost) in order to determine whether there was a gain or loss from the sale of their labor. *Cottage Savings Association v. Commissioner of Internal Revenue*, 499 US 554, 568, 113 L.Ed 2d 589, 111 S.Ct. 1503 (1991).

Because the Tax Court and the Appellate Court disposed of the Petition and Appeal at the pleading stage and on a misapplication and incorrect rule of law, the Petitioners were denied the right to arrange their affairs under the law, and present those factors that would establish that the gift of their labor is a gift for income tax purposes and that they have a basis (cost) in their labor. For those reasons, the Petitioners were not permitted to assert those deductions that they were entitled to under the Internal Revenue Laws. As such the Deficiencies demand more than authorized by law.

CONCLUSION

It is patently clear, that the Appellate Court's judgment found or proceeded on facts that were neither plead, nor could be inferred from the pleadings. It is also equally clear that the Appellate Court's judgment ignored essential issues to the resolution of this action. In all three instances, the Appellate Court's judgment was made in a way that arguably conflicts with several relevant decisions of this Court.

Accordingly, and for the forgoing reasons, this Court should issue the Writ of Certiorari to the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 29th day of April, 1996.

NOEL D. McNEEL
c/o P.O. Box 2
CHANDLER, ARIZONA 85244
(602) 671-6299
PETITIONERS, IN PRO PER

JOYCE A. McNEEL

WILLIAM KURNIK
c/o 40 NORTH GILBERT
GILBERT, ARIZONA 85234
(602) 924-5174
PETITIONERS, IN PRO PER

NANCY KURNIK

WILLIAM PRESSLEY
12009 N. 114TH AVENUE
YOUNGTOWN, ARIZONA 85363
(602) 977-1943
PETITIONER , IN PRO PER

APPENDIX A
McNEEL

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APPENDIX A

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED JAN 30, 1996

NOEL D. McNEEL, JOYCE A. McNEEL	)	No. 95-70653
Petitioners-Appellants,	)	Tax Ct. No. 23741-94
v.	)	
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	Memorandum*
Respondent-Appellee.	)	

Appeal from the United States Tax Court

Submitted January 23, 1996**

Before: ALARCON, HALL, and BRUNETTI, Circuit Judges.

Noel and Joyce McNeel appeal pro se the tax court's dismissal for failure to state a claim of their petition for redetermination of federal income tax deficiencies for the 1992 tax year. We have jurisdiction pursuant to 26 U.S.C. § 7482, and we affirm.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

The McNeels contend that the compensation they received from their employers is not taxable because their labor is equal to the amount of compensation they received. The tax court properly rejected this frivolous contention. Carter v. Commissioner, 784 F.2d 1006, 1009 (9th Cir., 1986); Olson v. United States 760 F.2d 1003, 1005 (9th Cir., 1985).

Because we agree with the tax court that the McNeel's petition is frivolous, we affirm the tax court's imposition of penalty pursuant to 26 U.S.C. § 6673. See Larson v. Commissioner, 765 F.2d 939, 941 (9th Cir., 1985) (per curiam).

We grant the Commissioner's request for sanctions in the amount of $2500 because the result is obvious and the McNeels' argument that their compensation is not taxable is wholly without merit. See 28 U.S.C. § 1912; Fed. R. App. P. 38; Olson 760 F.2d at 1005. We rejected the identical argument in the McNeels' previous appeal. See McNeel v. Commissioner, No. 94-70887 (unpublished disposition) (9th Cir., Jul. 3, 1995).

AFFIRMED WITH SANCTIONS

UNITED STATES TAX COURT
Washington, D.C. 20217

NOEL D. McNEEL, JOYCE A. McNEEL	)	
Petitioners	)	
v.	)	
	)	Docket No. 23741-94
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	
Respondent	)	

ORDER OF DISMISSAL AND DECISION

Pursuant to the determination of the Court, as set forth in T.C. Memo 1995-211, filed May 17, 1995, it is hereby

ORDERED: That respondent's Motion to Dismiss for Failure to State a Claim, filed February 15, 1995, is granted and this case is hereby dismissed for failure to state a claim upon which relief can be granted. It is further

ORDERED: That the respondent's Motion for Sanctions Pursuant to I.R.C. Section 6673, filed February 15, 1995, is granted. It is further

ORDERED and DECIDED: That petitioners are liable for deficiencies in and additions to their Federal Income Tax as follows:

Noel D. McNeel

		Additions to Tax	
Year	Deficiency	§6651(a)(1)	§ 6654
1992	$ 1,481	$ 262	$ 44

Joyce A. McNeel

		Additions to Tax	
Year	Deficiency	§6651(a)(1)	§ 6654
1992	$ 1,481	$ 262	$ 44

It is further

ORDERED AND DECIDED: That each petitioner shall pay a penalty to the United States pursuant to section 6673(a) in the amount of $1,500.

(Signed) Robert N. Armen, Jr.
Robert N. Armen, Jr.
Special Trial Judge

Entered: May 18, 1995

T.C. Memo 1995-211

UNITED STATES TAX COURT

NOEL D. AND JOYCE A. MCNEEL, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 23741-94 Filed May 17, 1995

Richard S. Goldstein and J. Robert Cuatto, for respondent

MEMORANDUM OPINION

ARMEN, Special Trial Judge: This case is before the Court on the following: (1) Respondent's Motion to Dismiss for Failure to State a Claim, filed pursuant to Rule 40,[1] and (2) respondent's Motion for Sanctions Pursuant to I.R.C. § 6673.

Petitioners resided in Maricopa County, Arizona, at the time their petition was filed with the Court

Respondent's Notices of Deficiency

By separate notices, each dated September 22, 1994, respondent determined deficiencies in, and additions to, petitioners' Federal Income taxes for the taxable year 1992 as follows:

Noel D. McNeel

		Additions to Tax	
Year	Deficiency	§6651(a)(1)	§ 6654
1992	$ 1,481	$ 262	$ 44

1/ All Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Code in effect for the taxable year in issue.

Joyce A. McNeel

Year	Deficiency	§6651(a)(1)	§ 6654
1992	$ 1,481	$ 262	$ 44

The deficiencies in income tax were based on respondent's determination that petitioners together received compensation during 1992 in the total amount of $30,310, no part of which was reported on any income tax return for that year. Pursuant to the community property laws of the State of Arizona, respondent further determined that one-half of petitioners' total compensation, or $15,155, was taxable to each petitioner.

The additions to tax under section 6651(a)(1) were based on respondent's determination that petitioners' failure to file any income tax return for 1992 was not due to reasonable cause. Finally, the additions to tax under section 6654 were based on respondent's determination that petitioners failed to pay the requisite estimated income tax for 1992.

Petitioners' Petition

Petitioners filed a joint petition for redetermination on December 23, 1994. The Petition includes allegations that petitioners have a fair market value basis in their labor as a "day to day gift from their Creator." In conjunction with the foregoing, the petition includes the following statements:

> During the year 1992 neither Petitioner was an employee of the companies they worked for nor were they engaged in employment nor did they] provide no services [sic] the companies they worked for. There merely sold their labor under contract.
>
> During the year 1992, neither of the Petitioners were otherwise engaged in any profession, trade, employment or vocation or any business upon which an income tax can be imposed.

> Petitioner Noel D. McNeel is a Man created by God Almighty.
>
> Petitioner Joyce A. McNeel is a Woman created by God Almighty.
>
> Their Life is given to them each day as an endowment (gift) from God.
>
> The labor of both Petitioners is their property.
>
> As a part of their Life they receive their labor as a day to day gift from their Creator.
>
> The gift of Petitioners' labor is a gift for income tax purposes.
>
> The property was received by the Petitioners after December 31, 1920.
>
> The Petitioners' Creator is the original owner of this property and the Petitioners' Creator did not receive the property as a gift before giving it to the Petitioners.
>
> During the year 1992, Petitioner Noel D. McNeel sold his labor under contract to various construction companies and Joyce A. McNeel sold her labor under contract to Luby's Cafeterias, Inc. The Petitioners received a combined total of $30,130.00 for the sale of that labor. Petitioners had a basis (cost) of at least $30,310.00 in the labor they sold during the year 1992.
>
> The money the Petitioners received during the year 1992 was not "wages" (remuneration for services) or compensation for services.

In their prayer for relief, petitioners "request and lawfully demand" that the Court declare, inter alia, that "Petitioners are non-resident aliens under the internal

revenue laws" or in the alternative, that "the income, if there be any, was from a foreign estate or trust within the State of Arizona and without the Untied States."

Respondent's Rule 40 Motion and Subsequent Developments

As indicated, on February 15, 1995, respondent filed her Motion to Dismiss for Failure to State a Claim and her Motion for Sanctions Pursuant to I.R.C. § 6673. Shortly thereafter, on February 17, 1995, the Court issued and served an order calendaring respondent's motions for hearing and also directing petitioners to file a proper amended petition in accordance with the requirements of Rule 34. Specifically, the Court directed petitioners to file by March 22, 1995, an amended petition setting forth with specificity each error allegedly made by respondent in the determination of the deficiencies and separate statements of every fact upon which the assignments of error are based. Petitioners failed to respond to the Court's order and have never filed an amended petition.

A hearing was held in this case in Washington, D.C., on March 22, 1995. Counsel for respondent appeared at the hearing and presented argument on the pending motions. Petitioners did not appear at the hearing, nor did they file a statement with the Court pursuant to Rule 50(c).[2]

Discussion

Rule 40 provides that a party may file a motion to dismiss for failure to state a claim upon which relief can be granted. We may grant such a motion when it appears beyond doubt that the party's adversary can prove no set of facts in support of a claim which would entitle him or her to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Price v. Moody, 677 F.2d 676, 677 (8th Cir., 1982)

Rule 34(b)(4) requires that a petition filed in this Court contain clearly and concise assignments of each and every error which the taxpayer alleges to have been committed by the Commissioner in the determination of the deficiency and additions to tax in dispute. Rule 34(b)(5) further requires that the petition contain clear and concise lettered statements of the facts on which the taxpayer bases the assignments of error. See Jarvis v. Commissioner, 78 T.C. 646, 658 (1982). The failure of the petition to conform with the requirements set forth in Rule 34 may be grounds for dismissal. Rules 34(a)(1); 123(b).

In general, the determinations made by the Commissioner in a notice of deficiency are presumed to be correct, and the taxpayer bears the burden of proving that those determinations are erroneous. Rule 142(a); Whelch v. Helvering, 290 U.S. 111, 115 (1933). Moreover, any issue not raised in the pleadings is deemed to be conceded. Rule 34(b)(4); Jarvis v. Commissioner, 78 T.C. 646, 658 n. (1982); Gordon v. Commissioner, 73 T.C. 736, 739 (1980).

The petition filed in this case does not satisfy the requirements of Rule 34(b)(4) and (5). There is neither assignment of error or allegation of fact in support of any justiciable claim. Rather, there is nothing more but tax protester rhetoric, as demonstrated by the passages from the petition that we have quoted above. See Abrams v. Commissioner, 82 T.C. 403 (1984); Rowlee v. Commissioner, 80 T.C. 1111 (1983); McCoy v. Commissioner, 76 T.C. 1027 (1981), affd. 696 F.2d 1234 (9th Cir., 1983). Further, petitioners did not file a proper amended petition as directed by the Court in its Order dated February 17, 1995.

2/ In its order calendaring respondent's motions for hearing, the Court reminded petitioners of the applicability of Rule 50(c).

We see no need to catalog petitioners' contentions and painstakingly address them. We have dealt with many of them before. E.g., Neiman v. Commissioner, T.C. Memo. 1993-533; Solomon v. Commissioner, T.C. Memo. 1993-509, affd. without published opinion 42 F.3d 391 (7th Cir., 1994). Moreover, as the Court of Appeals for the Fifth Circuit has remarked: "We perceive no need to refute these arguments with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit." Crain v. Commissioner, 737 F.2d 1417, 1417 (5th Cir., 1984). Suffice it to say that both this and other Federal courts have consistently and uniformly held for many years that wages are income and that a taxpayer has no basis in his or her labor. E.g., Beard v. Commissioner, 793 F.2d 139 (6th Cir., 1986), affg. 82 T.C. 766 (1984); Coleman v. Commissioner, 791 F.2d 68, 70 (7th Cir., 1986); United States v. Burton, 737 F.2d 441 (5th Cir., 1984); United States v. Romero, 640 F.2d 1014, 1016 (9th Cir., 1981) (Compensation for labor or services, paid in the form of wages or salary, has been universally held by the courts of the republic to be income, subject to the income tax laws currently applicable."). United States v. Buras, 633 F.2d 1356 (9th Cir., 1980); Abrams v. Commissioner, supra, at 407; Rowlee v. Commissioner, supra at 1119-1122; Reiff v. Commissioner, 77 T.C. 1169, 1173 (1981); Reading v. Commissioner, 70 T.C. 730 (1978), affd. 614 F.2d 159 (8th Cir., 1980); Fischer v. Commissioner, T.C. Memo 1994-586; Zyglis v. Commissioner, T.C. Memo 1993-341, affd. without published opinion 29 F.3d 620 (2nd Cir., 1994); Fox v. Commissioner, T.C. Memo. 1993-277; Williams v. Commissioner, T.C. Memo. 1988-368; Hebrank v. Commissioner, T.C. Memo. 1982-496. See sec. 61(a)(1).

Because the petition fails to state a claim upon which relief can be granted, we shall grant respondent's Motion

to dismiss. See Scherping v. Commissioner, 747 F.2d 478 (8th Cir., 1984)

We turn now to respondent's Motion for Sanctions pursuant to I.R.C. § 6673.

As relevant herein, section 6673(a)(1) authorizes the Tax Court to require a taxpayer to pay to the United States a penalty not in excess of $25,000 whenever it appears that proceedings have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer's position in such proceeding is frivolous or groundless.

The record in this case convinces us that petitioners were not interested in disputing the merits of either the deficiencies in income tax or the additions to tax determined by respondent in the notices of deficiency. Rather, the record demonstrates that petitioners regard this case as a vehicle to protest the tax laws of this country and espouse there own misguided views.

A petition to the Tax Court is frivolous "if it is contrary to established law and unsupported by a reasoned, colorable argument for change in the law." Coleman v. Commissioner, 791 F.2d 68, 71 (7th Cir., 1986). Petitioners' position, as set forth in the petition consists solely of stale and time-worn tax protester rhetoric. Based on well-established law, petitioners' position is frivolous and groundless.

We are also convinced that petitioners instituted and maintained this proceeding primarily, if not exclusively, for purposes of delay. Having to deal with this matter wasted the Court's time, as well as respondent's. Moreover, taxpayers with genuine controversies were delayed.

Petitioners are not strangers to this Court. In December 1993, they filed a petition at docket No. 25907-93. That case involved deficiencies in income taxes and additions to tax under sections 6651(a)(1) and 6654(a) for

the taxable years 1986 through 1991. In March 1994, respondent filed a motion dismiss for failure to state a claim. A hearing was held in Phoenix, Arizona, and on June 2, 1994, the Court rendered a[n] Oral Opinion granting respondent's motion to dismiss, as well as respondent's oral motion for penalty under section 6673. In its Oral Opinion, the Court specifically addressed, and rejected, petitioners' contention that they had a cost basis in their labor equal to the amount of wages received. In addition, petitioners were expressly told that they are not exempt from Federal income tax.

The fact that petitioners have chosen to appeal the Court's Order and Decision at docket No. 25907-93 in no way militates against imposing a penalty under section 6673 against petitioners. As stated above, the contention that wages do not constitute income has been consistently and uniformly rejected, for many years, by both this and other federal courts.

In view of the foregoing, we shall exercise our discretion under section 6673(a)(1), grant respondent's motion for sanctions, and require each petitioner to pay a penalty to the United States in the amount of $1,500. Coleman v. Commissioner, supra, at 71-72; Crain v. Commissioner, supra at 1417-1418; Coulter v. Commissioner, 82 T.C. 580, 584-586 (1984); Abrams v. Commissioner, 82 T.C. 402, 408-411 (1984)

To reflect the foregoing,

An order of dismissal and decision will be entered for respondent.

NOEL D. McNEEL
JOYCE A. McNEEL
c/o P.O. Box 2
Chandler, Arizona 85244
Petitioners, In Pro Per

UNITED STATES TAX COURT

NOEL D. McNEEL JOYCE A. McNEEL	)	
Petitioners	)	
v.	)	Docket No. 25907-93
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	**PETITION**
Respondent.	)	

The Petitioners, Noel D. and Joyce A. McNeel, hereby petition for dismissal of the Notices of Deficiency issued by the Commissioner of Internal Revenue for the year 1992 and as a basis for their Case allege and aver as follows:

1. The Petitioners can be found in Maricopa County, Arizona by using P.O. Box 2, Chandler, Arizona 85244.
2. The Notices of Deficiency, copies of which is attached as Exhibits A and B, including all statements of the Commissioner attached thereto, were mailed to the Petitioners on or about September 22, 1994. The Notices were purportedly issued by Mark D. Fox, District, Director in Phoenix, Arizona.

3. The Deficiency in taxes determined for Noel D. McNeel for the year 1992 is $1,481.00. The Deficiency in taxes determined for Joyce A. McNeel for the year 1992 is $1,481.00.
4. Penalties per section are set forth below:

NOEL D. McNEEL

Year	§ 6651(a)(1)	§ 6654
1992	$ 262.00	$ 44.00

JOYCE A. McNEEL

Year	§ 6651(a)(1)	§ 6654
1992	$ 262.00	$ 44.00

5. The determination of tax set forth in said Notices of Deficiency is based upon the following errors:
   (a). Error in proceeding as if the Petitioners are filing married filing separately.
   (b). Error in proceeding as if the Petitioners were engaged in an source activity upon which an income tax can be imposed.
   (c). Error in issuing the Notice of Deficiency without establishing the basis for or making the determination of the existence of the deficiency.
   (d). Error in proceeding as if the Petitioners had a "zero" basis (cost) in the labor they sold during the year 1992.
6. The facts upon which the Petitioners rely, as the basis for their case, are as follows:
   (a). During the year 1992 neither Petitioner was an employee of the companies they worked for nor were they engaged in employment nor did the provide no services the companies they

worked for. They merely sold their labor under contract.
(b). During the year 1992, neither of the Petitioners were otherwise engaged in any profession, trade, employment or vocation or any business upon which an income tax can be imposed.
(c). Petitioner Noel D. McNeel is a Man created by God Almighty.
(d). Petitioner Joyce A. McNeel is a Woman created by God Almighty.
(e). Their Life is given to them each day as an endowment (gift) from God.
(f). The labor of both Petitioners labor is their property.
(g). As a part of their Life they receive their labor as a day to day gift from their Creator.
(h). The gift of Petitioners' labor is a gift for income tax purposes.
(i). The property was received by the Petitioners after December 31, 1920.
(j). The Petitioners' Creator is the original owner of this property and the Petitioners' Creator did not receive the property as a gift before giving it to the Petitioners.
(k). The Petitioners have been unable to discover the basis (cost) the Petitioners' Creator had in the labor at the time it was given to them as a gift.
(l). The Secretary has either failed to determine the basis (cost) in the Petitioners' labor as required by Internal Revenue Code (IRC), § 1015(a) or has been unable to determine the basis (cost) that the Petitioners' Creator had in the gift of the labor was given to the Petitioners.

(m). If the Secretary is unable to determine the basis (cost) of the Petitioners' labor that was received as a gift, the Secretary must proceed as if the basis (cost) is the "**FAIR MARKET VALUE**" of the property based upon the best information available to him.

(n). The only information available to the Secretary to determine the basis (cost) the Petitioners had in their labor would be the amount they received each day they sold their labor.

(o). During the year 1992, Petitioner Noel D. McNeel sold his labor under contract to various construction companies and Joyce A. McNeel sold her labor under contract to Luby's Cafeterias, Inc. The Petitioners received a combined total of $30,310.00 for the sale of that labor. Petitioners had a basis (cost) of at least $30,310.00 in the labor they sold during the year 1992.

(p). The money the Petitioners received during the year 1992 was not "wages" (remuneration for services) or compensation for services.

RELIEF SOUGHT

WHEREFORE, the Petitioners respectfully request and lawfully demand that this Court:

A. Dismiss the Commissioner's Notice of Deficiency; and,

B. Declare that the Petitioners are non-resident aliens under the internal revenue laws; or in the alternative,

C. Declare that the income, if there be any, was from a foreign estate or trust within the State of Arizona and without the United States.

D. Declare that IRC, §1015(a) would generally establish a presumption that a Man or Woman has

a "**FAIR MARKET VALUE**" basis (cost) in his or her labor.

E. Declare that the Respondent has the burden of proof of showing that the Petitioners have a basis (cost) other than a "**FAIR MARKET VALUE**" basis (cost) in their labor; and,

F. Declare that the Petitioners have a "**FAIR MARKET VALUE**" basis (cost) in their labor; and,

G. Issue a written memorandum decision declaring that there was no Deficiency in income taxes; and,

H. Grant such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this _____ day of December, 1994.

_____ _____

NOEL D. McNEEL
c/o P.O. Box 2
Chandler, Arizona 85244
Petitioners, In Pro Per

JOYCE A. McNEEL

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APPENDIX B
KURNIK

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APPENDIX B

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED NOV 3, 1995

WILLIAM KURNIK, NANCY KURNIK	)	No. 95-70328
Petitioners-Appellants,	)	Tax Ct. No. 11310-94
v.	)	
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	Memorandum*
Respondent-Appellee.	)	

Appeal from the United States Tax Court

Submitted October 24, 1995**

Before: BEEZER, THOMPSON, and T.G. NELSON, Circuit Judges.

William and Nancy Kurnik appeal pro se the tax court's dismissal for failure to state a claim upon which relief can be granted of their petition for redetermination of federal income tax deficiencies for tax years 1985-89. We have jurisdiction pursuant to 26 U.S.C. § 7482 and we affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

The Kurniks contend that their income for the relevant years is not taxable as "wages" within the meaning of the Internal Revenue Code, because the Code fails to consider the fair market value of the basis of their labor as a gift from their creator, and the Kurniks can show that their basis in their labor is equal to the amount of income received. The tax court properly rejected this frivolous contention. See Carter v. Commissioner, 784 F.2d 1006, 1009 (9th Cir., 1986); Olson v. United States, 760 F.2d 1003, 1005 (9th Cir., 1985)

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED JAN 29, 1996

WILLIAM KURNIK, NANCY KURNIK	)	No. 95-70328
Petitioners-Appellants,	)	Tax Ct. No. 11310-94
v.	)	
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	ORDER
Respondent-Appellee.	)	

Before: BEEZER, THOMPSON, and T.G. NELSON, Circuit Judges.

The petition for rehearing is denied.

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UNITED STATES TAX COURT
Washington, D.C. 20217

WILLIAM KURNIK NANCY KURNIK	)	
Petitioners	)	
v.	)	
	)	Docket No. 11310-94
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	
Respondent	)	

ORDER OF DISMISSAL AND DECISION

This matter is before the Court on respondent's Motion Dismiss for Failure to State a Claim Upon Which Relief Can be Granted filed September 26, 1994. The pertinent facts are summarized below.[1]

On March 22, 1994, respondent issued separate statutory notices of deficiency to William Kurnik and Nancy Kurnik (petitioners) determining deficiencies in and additions to their Federal income tax for the years and in the amounts as follows:

[1] Unless otherwise indicated, section references are to the Internal Revenue Code, as amended. Rule references are to the Tax Court Rules of Practice and Procedure.

William Kurnik

Year	Deficiency	Additions to Tax § 6651(a)(1)	Additions to Tax § 6653(a)(1)
1985	$ 6,129	$ 1,528	$ 306
1986	10,886	2,720	---
1987	4,212	1,053	---
1988	8,367	2,092	418
1989	4,670	1,168	---

Year	Additions to Tax § 6653(a)(1)(A)	§ 6653(a)(2)	§ 6653(a)(1)(B)	§ 6654
1985	---	50% of the interest due on deficiency	---	$ 350
1986	$ 544	---	50 % of the interest due on the deficiency	523
1987	211	---	50 % of the interest due on the deficiency	129
1988	---	---	---	533
1989	---	---	---	317

Nancy Kurnik

Year	Deficiency	Additions to Tax § 6651(a)(1)	Additions to Tax § 6653(a)(1)
1985	$ 1,1511	$ 374	$ 76
1987	1,894	474	---
1988	4,205	1,051	210
1989	1,271	318	---

Year	Additions to Tax § 6653(a)(1)(A)	§ 6653(a)(2)	§ 6653(a)(1)(B)	§ 6654
1985	---	50% of the interest due on deficiency	---	$ 85
1987	95	---	50 % of the interest due on the deficiency	---
1988	---	---	---	---
1989	---	---	---	---

Petitioners filed a joint petition for redetermination on June 27, 1994.[2] By order dated June 29, 1994, petitioners were directed to file by August 29, 1994, a proper amended petition. On August 29, 1994, petitioners filed an amended petition. The amended petition includes allegations that: (1) Petitioners are not citizens or residents of the United States but rather are nonresident aliens of the State of Arizona; (2) petitioners did not receive any income during the years in issue from sources within the United States; and (3) petitioners have a fair market value basis in their labor as a "day to day gift from their Creator."

As indicated, respondent filed a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted. By order dated September 29, 1994, petitioners were directed to file by October 25, 1994, a second amended petition setting forth with specificity each error allegedly made by respondent in the determination of the deficiencies and separate statements of every fact upon which the assignments of error are based.

On October 27, 1994, petitioners filed a response to respondent's motion to dismiss and a Rule 50(c)

2/ At the time the petition was filed, petitioners resided in Gilbert, Arizona

statement with the Court. Both the response and the Rule 50(c) statement repeat many of the arguments contained in petitioners' original amended petition.

A hearing on respondent's motion to dismiss was held in Washington, D.C., on November 2, 1994. Counsel for respondent appeared at the hearing and presented argument on the motion.

Rule 34(b) provides that a petition shall contain clear and concise assignments of each and every error allegedly made by respondent in the determination of the deficiency and separate statements of every fact upon which the assignments of error are based. Our Rules further provide that failure of a petition to conform with the requirements set forth in Rule 34 may be grounds for dismissal. Rule 34(a)(1) and 123(b).

It is evident that the original amended petition filed in this case does not comply with Rule 34 to the extent that the allegations contained therein amount to nothing more than time-worn tax protestor rhetoric. See Abrams v. Commissioner, 82 T.C. 403 (1984); Rowlee v. Commissioner, 80 T.C. 1111 (1983); McCoy v. Commissioner, 76 T.C. 1027 (1981), affd. 696 F.2d 1234 (9th Cir., 1983). Further, petitioners failed to comply with the Court's order to file a proper second amended petition. Rather, petitioners continue to proceed on the flawed theory that they have a fair market value basis in their labor. This argument was soundly rejected by the Court in Abrams v. Commissioner, supra at 407-08 and Rowlee v. Commissioner, supra at 1119-1120.

Because petitioners failed to state a claim upon which relief may be granted in this case, respondent's motion to dismiss will be granted. Premises considered, it is

ORDERED: That respondent's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted filed September 24, 1994, is granted and this

case is hereby dismissed for failure to state a claim upon which relief can be granted. It is further

ORDERED AND DECREED: That there are deficiencies and additions to petitioners' Federal income tax for the years and in the amounts as follows:

William Kurnik

		Additions to Tax	
Year	Deficiency	§ 6651(a)(1)	§ 6653(a)(1)
1985	$ 6,129	$ 1,528	$ 306
1986	10,886	2,720	---
1987	4,212	1,053	---
1988	8,367	2,092	418
1989	4,670	1,168	---

	Additions to Tax			
Year	§ 6653(a)(1)(A)	§ 6653(a)(2)	§ 6653(a)(1)(B)	§ 6654
1985	---	50% of the interest due on deficiency	---	$ 350
1986	$ 544	---	50 % of the interest due on the deficiency	523
1987	211	---	50 % of the interest due on the deficiency	129
1988	---	---	---	533
1989	---	---	---	317

Nancy Kurnik

		Additions to Tax	
Year	Deficiency	§ 6651(a)(1)	§ 6653(a)(1)
1985	$ 1,1511	$ 374	$ 76
1987	1,894	474	---
1988	4,205	1,051	210
1989	1,271	318	---

Year	Additions to Tax § 6653(a)(1)(A)	§ 6653(a)(2)	§ 6653(a)(1)(B)	§ 6654
1985	---	50% of the interest due on deficiency	---	$ 85
1987	95	---	50 % of the interest due on the deficiency	---
1988	---	---	---	---
1989	---	---	---	---

(Signed) L.W. Hamblen, Jr.
L.W. Hamblen, Jr.
Chief Judge

Entered: Dec 7, 1994

WILLIAM KURNIK
NANCY KURNIK
c/o 40 North Gilbert
Gilbert, Arizona 85234
(602) 924-5174
Petitioners, In Pro Per

UNITED STATES TAX COURT

WILLIAM KURNIK NANCY KURNIK	)	
Petitioners	)	
v.	)	Docket No. 11310-94.
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	**PETITION**
Respondent.	)	

The Petitioners, William and Nancy Kurnik, hereby petition for dismissal of the Notices of Deficiency issued by the Commissioner of Internal Revenue for the years 1985 through 1989 for Petitioner William Kurnik and for 1985 and 1987 through 1989 for Petitioner Nancy Kurnik and as a basis for their Case allege and aver as follows:

1. The Petitioners can be found in Maricopa County, Arizona at 462 South Gilbert #717, Mesa, Arizona 85204.
2. The Notices of Deficiency, copies of which is attached as Exhibits A through D, including all statements of the Commissioner attached thereto, were mailed to the Petitioners on or about March 22, 1994. The Notices were issued by Mark D. Cox, District Director, in Phoenix, Arizona.

3. The Deficiency in taxes determined for William Kurnik for the year 1985 is $6,129.00; for the year 1986 is $10,886.00; for the year 1987 is $4,212.00; for the year 1988 is $8,367.00; and, for the year is $4,670.00. The Deficiency in taxes determined for Nancy Kurnik for the year 1985 is $1,511.00; for the year 1987 is $1,894.00; for the year 1988 is $4,205.00; and, for the year 1989 is $1,207.00.
4. Penalties per section are set forth below:

WILLIAM KURNIK

Year	§ 6651(a)(1)	§ 6653(a)(1)	§ 6653(a)(1)(A)
1985	$ 1,528	$ 306	N/A
1986	2,720	N/A	$ 544
1987	1,053	N/A	$ 211
1988	2,092	418	N/A
1989	1,168	N/A	N/A

Year	§ 6653(a)(1)(B)	§ 6653(a)(2)	§ 6654
1985	N/A	*	$ 350
1986	**	N/A	523
1987	***	N/A	129
1988	N/A	N/A	533
1989	N/A	N/A	317

* 50% of interest due on $ 6,129.00
** 50% of interest due on $10,886.00
*** 50% of interest due on $ 4,212.00

NANCY KURNIK

Year	§ 6651(a)(1)	§ 6653(a)(1)	§ 6653(a)(1)(A)
1985	$ 374	$ 76	N/A
1987	474	N/A	$ 95
1988	1,051	210	N/A
1989	318	N/A	N/A

Year	§ 6653(a)(1)(B)	§ 6653(a)(2)	§ 6654
1985	N/A	*	$ 85
1987	**	N/A	N/A
1988	N/A	N/A	N/A
1989	N/A	N/A	N/A

* 50% of interest due on $ 1,511.00
** 50% of interest due on $ 1,894.00

5. The determination of tax set forth in said Notices of Deficiency is based upon the following errors:
   (a). Error in proceeding as if the Petitioners are filing married filing separately.
   (b). Error in proceeding as if the income, if there was any, was attributable to the Petitioners as income of **individual** "citizens or residents of the United States."
   (c). Error in proceeding as if the Petitioners' income, if there was any, was derived from sources within the United States.
   (d). Error in issuing the Notice of Deficiency without establishing the basis for or making the determination of the existence of the deficiency.
   (e). Error in proceeding as if the Petitioner William Kurnik had a "zero" basis (cost) in the labor he sold each day in the management of the Laundromat during the year 1985.

(f). Error in proceeding as if the Petitioner William Kurnik had a "zero" basis (cost) in the labor he sold each day in the management of the Laundromat during the year 1986.

(g). Error in proceeding as if the Petitioner William Kurnik had a "zero" basis (cost) in the labor he sold each day in the management of the Laundromat during the year 1987.

(h). Error in proceeding as if the Petitioner William Kurnik had a "zero" basis (cost) in the labor he sold each day in the management of the Laundromat during the year 1988.

(i). Error in proceeding as if the Petitioner William Kurnik had a "zero" basis (cost) in the labor he sold each day in the management of the Laundromat during the year 1989.

(j). Error in proceeding as if the Petitioner Nancy Kurnik had a "zero" basis (cost) in the labor she sold each day to Hi Health Supermarket for the year 1985.

(k). Error in proceeding as if the Petitioner Nancy Kurnik had a "zero" basis (cost) in the labor she sold each day to Fry's Food Stores for the year 1987.

(l). Error in proceeding as if the Petitioner Nancy Kurnik had a "zero" basis (cost) in the labor she sold each day to Fry's Food Stores for the year 1988.

6. The facts upon which the Petitioners rely, as the basis for their case, are as follows:

(a). During the years 1985 through 1989 the Petitioners were non-resident aliens. Though being found in Arizona they did not established residence at any time. They have not applied for permanent residence "within the United States" ("**green card**" test), nor

were they resident "within the United States" under the substantive presence test.

(b). During the years 1985 through and 1989, the Petitioners did not receive any dividends, rents, royalties, interest or other fixed or determinable, annual or periodical income "within the United States", as defined in the Internal Revenue Code (IRC), §871(a) and the regulations promulgated thereunder.

(c). During the years 1985 through 1989, the Petitioners did not receive any income "within the United States" or any income without the United States that was effectively connected with the conduct of a trade or business "within the United States."

(d). During the years 1985 through 1989, the Petitioner did not make an election under IRC, §871(d).

(e). The labor of both Petitioners labor is their property.

(f). As a part of their life they receive their labor as a day to day gift from their Creator.

(g). The property was received by the Petitioners after December 31, 1920.

(h). The Petitioners' Creator is the original owner of this property and the Petitioners' Creator did not receive the property as a gift before giving it to the Petitioners.

(i). The Petitioners have been unable to discover the basis (cost) the Petitioners' Creator had in the labor at the time it was given to them as a gift.

(j). The Secretary has either failed to determine the basis (cost) in the Petitioners' labor as required by Internal Revenue Code (IRC), § 1015(a) or has been unable to determine the

basis (cost) that the Petitioners' Creator had in the gift of the labor was given to the Petitioners.

(k). If the Secretary is unable to determine the basis (cost) of the Petitioners' labor that was received as a gift, the Secretary must proceed as if the basis (cost) is the "**FAIR MARKET VALUE**" of the property based upon the best information available to him.

(l). The only information that would be available to the Secretary to determine the basis (cost) the Petitioners had in their labor would be the amount they received each day they sold their labor.

(m). During the year 1985, Petitioner William Kurnik sold his labor to the public in the management and maintenance of his Laundromat. For that labor the public paid for use of the machines and the Petitioner received $44,782.00. Petitioner had a basis (cost) of at least $44,782.00 in the labor he sold to the public.

(n). During the year 1986, Petitioner William Kurnik sold his labor to the public in the management and maintenance of his Laundromat. For that labor the public paid for use of the machines and the Petitioner received $36,324.00. Petitioner had a basis (cost) of at least $36,324.00 in the labor he sold to the public.

(o). During the year 1986, Petitioner William Kurnik sold his labor to Response Communications Inc. and Walker Research Inc. For that labor he received $449.00. Petitioner had a basis (cost) of at least $449.00 in the labor he sold to Responses

Communications Inc. and Walker Research Inc.

(p). During the year 1987, Petitioner William Kurnik sold his labor to the public in the management and maintenance of his Laundromat. For that labor the public paid for use of the machines and the Petitioner received $27,082.00. Petitioner had a basis (cost) of at least $27,082.00 in the labor he sold to the public.

(q). During the year 1988, Petitioner William Kurnik sold his labor to the public in the management and maintenance of his Laundromat. For that labor the public paid for use of the machines and the Petitioner received $45,667.00. Petitioner had a basis (cost) of at least $45,667.00 in the labor he sold to the public.

(r). During the year 1989, Petitioner William Kurnik sold his labor to the public in the management and maintenance of his Laundromat. For that labor the public paid for use of the machines and the Petitioner received $37,293.00. Petitioner had a basis (cost) of at least $37,293.00 in the labor he sold to the public.

(s). During the year 1985, Petitioner Nancy Kurnik sold her labor to Hi-Health Supermarket Corp. From Hi-Health she received $482.00 for the sale of that labor. Petitioner had a basis (cost) of at least $482.00 in the labor she sold to Hi-Health.

(t). During the year 1987, Petitioner Nancy Kurnik sold her labor to Fry's Food Stores. From Fry's she received $14,569.00 for the sale of that labor. Petitioner had a basis

(cost) of at least $14,569.00 in the labor she sold to Fry's.

(u). During the year 1988, Petitioner Nancy Kurnik sold her labor to Fry's Food Stores. From Fry's she received $20,692.00 for the sale of that labor. Petitioner had a basis (cost) of at least $20,,692.00 in the labor she sold to Fry's.

(v). The money received from the management and maintenance of the Laundromat, Hi-Health or Fry's Food are not "Wages" or "Compensation for Services" or "Non-Employee Compensation."

(w). The Petitioners were not employees, or engaged in employment or self-employment. They merely sold their labor for the money they received.

RELIEF SOUGHT

WHEREFORE, the Petitioners respectfully request and lawfully demand that this Court:

A. Dismiss the Commissioner's Notice of Deficiency; and,

B. Declare that the Petitioners are non-resident aliens under the internal revenue laws; or in the alternative,

C. Declare that IRC, §1015(a) would generally establish a presumption that a Man or Woman has basis (cost) in his or her labor that is equal to the **FAIR MARKET VALUE** of his or her labor.

D. Declare that the Respondent has the burden of proof of showing that the Petitioners have a basis (cost) in their labor other than the **FAIR MARKET VALUE** of their labor; and,

E. Declare that the Petitioners have a basis (cost) in their labor that is at least equal to the **FAIR MARKET VALUE** of their labor; and,

F. Issue a written memorandum decision declaring that there was no Deficiency in income taxes; and,

G. Grant such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this _____ day of August, 1994.

_____ _____

WILLIAM KURNIK
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(602) 924-5174
Petitioners, In Pro Per

NANCY KURNIK

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APPENDIX C
PRESSLEY

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APPENDIX C

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED NOV 22, 1995

WILLIAM I. PRESSLEY	)	No. 95-70476
Petitioner-Appellant,	)	Tax Ct. No. 14784-94
v.	)	
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	Memorandum*
Respondent-Appellee.	)	

Appeal from the United States Tax Court

Submitted November 20, 1995**

Before: PREGERSON, NORRIS, and REINHARDT Circuit Judges.

William Pressley appeals pro se the tax court's order dismissing for failure to state a claim upon which relief may be granted his petition for redetermination of federal income tax deficiencies for tax years 1987-1989. We have jurisdiction pursuant to 26 U.S.C. § 7482, and we affirm.

Pressley contends that the income for the relevant years is not taxable as "wages" within the meaning of the

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Internal Revenue Code, because the Code fails to consider the fair market value of the basis of his labor, as a gift from his creator and he can show that his basis in his labor is equal to the amount of income received. The tax court properly rejected this contention. See Carter v. Commissioner, 784 F.2d 1006, 1009 (9th Cir., 1986); Olson v. United States, 760 F.2d 1003, 1005 (9th Cir., 1985). Since Pressley's Motion to vacate the tax court decision was founded on the same argument, the tax court did not abuse its discretion in denying that motion. See Thomas v. Lewis, 945 F.2d 1119, 1123 (9th Cir., 1991)

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED APR 15, 1996

WILLIAM I. PRESSLEY	)	No. 95-70476
Petitioner-Appellant,	)	Tax Ct. No. 14784-94
v.	)	
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	Memorandum
Respondent-Appellee.	)	

Before: PREGERSON, NORRIS, and REINHARDT Circuit Judges.

The petition for rehearing is denied.

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UNITED STATES TAX COURT
Washington, D.C. 20217

WILLIAM I. PRESSLEY	)	
	)	
Petitioner	)	
	)	
v.	)	
	)	Docket No. 14784-94
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	
	)	
Respondent	)	

ORDER OF DISMISSAL AND DECISION

This matter is before the Court on respondent's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted filed December 5, 1994. The pertinent facts are summarized below.[1]

On May 13, 1994, respondent issued three separate notices of deficiency to petitioner determining deficiencies in and additions to his Federal income taxes for the taxable years in the amounts as follows:

		Additions to Tax	
Year	Deficiency	§ 6651(a)	§ 6654(a)
1987	$10,107	$2,526.75	$ 398.86
1988	1,653	413.25	105.73
1989	537	134.25	---

[1] Unless otherwise indicated, section references are to the Internal Revenue Code, as amended. Rule references are to the Tax Court Rules of Practice and Procedure.

The Notices of deficiency determined that petitioner did not file Federal income tax returns for the years in issue. Accordingly, the notices of deficiency determined omitted income from various sources resulting in tax liabilities (including self-employment taxes) for the taxable years 1987 through 1989.

Petitioner filed an imperfect petition for redetermination on August 5, 1994.[2] By order dated August 18, 1994, petitioner was directed to file by October 17, 1994, a proper amended petition. On October 17, 1994, petitioner filed an amended petition. The amended petition includes allegations that: (1) Petitioner is not a citizen or resident of the United States but rather is a nonresident alien; (2) petitioner did not receive any income during the years in issue from sources within the United States; and (3) petitioner has a fair market value basis in his labor as a "day to day gift from his Creator."

As indicated, respondent filed a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted. By order dated December 7, 1994, petitioner was directed to file by January 3, 1995, a second amended petition setting forth with specificity each error allegedly made by respondent in the determination of the deficiencies and separate statements of every fact upon which the assignments of error are based. On January 5, 1995, petitioner filed a response to respondent's motion to dismiss repeating the same allegations contained in his amended petition.

A hearing on respondent's motion to dismiss was held in Washington, D.C., on January 11, 1995. Counsel for respondent appeared at the hearing and presented argument on the motion. Although petitioner did not

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2/ At the time the petition was filed, petitioner resided in Youngtown, Arizona.

appear at the hearing, he did file a statement with the Court pursuant to Rule 50(c).[3]

Rule 34(b) provides that a petition shall contain clear and concise assignments of each and every error allegedly made by respondent in the determination of the deficiency and separate statements of every fact upon which the assignments of error are based. Our Rules further provide that failure of a petition to conform with the requirements set forth in Rule 34 may be grounds for dismissal. Rule 34(a)(1) and 123(b).

It is evident that the original amended petition filed in this case does not comply with Rule 34 to the extent that the allegations contained therein amount to nothing more than time-worn tax protestor rhetoric. Petitioner's theory that he has a fair market value basis in his labor was soundly rejected by this Court in Abrams v. Commissioner, 82 T.C. 403, 407-408 (1984); Rowlee v. Commissioner, 80 T.C. 1111, 1119-1120 (1983). Further, petitioners failed to comply with the Court's order to file a proper second amended petition.

Because petitioner failed to state a claim upon which relief may be granted in this case, respondent's motion to dismiss will be granted. Premises considered, it is

ORDERED: That respondent's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted filed December 5, 1994, is granted and this case is hereby dismissed for failure to state a claim upon which relief can be granted. It is further

ORDERED AND DECREED: That there are deficiencies and additions to petitioner's Federal income tax for the years 1987, 1988 and 1989 as follows:

3/ Petitioner's statement also repeats the allegations contained in his amended petition.

Year	Deficiency	Additions to Tax § 6651(a)	§ 6654(a)
1987	$10,107	$2,526.75	$ 398.86
1988	1,653	413.25	105.73
1989	537	134.25	---

(Signed) L.W. Hamblen, Jr.
L.W. Hamblen, Jr.
Chief Judge

Entered: Jan 20, 1995

UNITED STATES TAX COURT

WILLIAM I. PRESSLEY Petitioner v. COMMISSIONER OF INTERNAL REVENUE SERVICE, Respondent	)	Docket No. 14784-94 **PETITION**

The Petitioner, William I. Pressley, hereby petitions for dismissal of the Notice of Deficiency issued by the Commissioner of Internal Revenue for the years 1987, 1988 and 1989 and as a basis for his Case alleges and avers as follows:

1. The Petitioner can be found in Maricopa County, Arizona at 12009 North 114th Avenue, Youngtown, Arizona 85363.
2. The Notices of Deficiency, copies of which is attached as Exhibits A, B and C, including all statements of the Commissioner attached thereto, were mailed to the Petitioner on or about May 13, 1994. The Notices were issued by Michael S. Bigelow, Director, Service Center, in Ogden, Utah.
3. The Deficiency in taxes determined for the year 1987 is $10,107.00; for the year 1988 is $1,653.00; and for the year 1989 is $537.00.
4. Penalties per section are set forth below:

Year	§ 6651(a)(1)	§ 6654
1987	$ 2,526.75	$ 545.86
1988	$ 413.00	$ 105.00
1989	$ 134.25	N/A

5. The determination of tax set forth in said Notice of Deficiency is based upon the following errors:
   (a). Error in proceeding as if the income, if there was any, was attributable to the Petitioner as income of an **individual** "citizen or resident of the United States."
   (b). Error in proceeding as if the Petitioner's income, if there was any, was derived from sources within the United States.
   (c). Error in issuing the Notice of Deficiency without establishing the basis for or making the determination of the existence of the deficiency.
   (d). Error in proceeding as if the Petitioner had a "zero" basis (cost) in the labor he sold each day that he worked at Saguaro Tire and Auto Service and Arizona Precision Parts, Inc. during the year 1990.
   (e). Error in proceeding as if the Petitioner had a "zero" basis (cost) in the labor he sold each day that he worked at Patrick Sherman and D.J. Partnership during the year 1991.
6. The facts upon which the Petitioner relies, as the basis for his case, are as follows:
   (a). During the years 1990 and 1991 the Petitioner was a non-resident alien. Though being found in Arizona he did not establish residence at any time. He has not applied for permanent residence "within the United States" ("**green card**" test), nor was he resident "within the United States" under the substantive presence test.
   (b). During the years 1990 and 1991, the Petitioner did not receive any dividends, rents, royalties, interest or other fixed or determinable, annual or periodical income

"within the United States", as defined in the Internal Revenue Code (IRC), §871(a) and the regulations promulgated thereunder.
   (c). During the years 1990 and 1991, the Petitioner did not receive any income "within the United States" or any income without the United States that was effectively connected with the conduct of a trade or business "within the United States."
   (d). During the years 1990 and 1991, the Petitioner did not make an election under IRC, §871(d).
   (e). The Petitioner is a Man created by God Almighty.
   (f). The Petitioner's Life is given to him each day as an endowment (gift) from his Creator.
   (g). The Petitioner's labor is his property.
   (h). As a part of his life he receives his labor as a day to day gift from his Creator.
   (i). The property was received by the Petitioner after December 31, 1920.
   (j). The Petitioner's Creator is the original owner of this property and the Petitioner's Creator did not receive the property as a gift before giving it to the Petitioner.
   (k). The Petitioner has been unable to discover the basis (cost) the Petitioner's Creator had in the labor at the time it was given to them as a gift.
   (l). The Secretary has either failed to determine the basis (cost) in the Petitioner's labor as required by Internal Revenue Code (IRC), § 1015(a) or has been unable to determine the basis (cost) that the Petitioner's Creator had in the gift of the labor was given to the Petitioner.

(m). If the Secretary is unable to determine the basis (cost) of the Petitioner's labor that was received as a gift, the Secretary must proceed as if the basis (cost) is the "**FAIR MARKET VALUE**" of the property based upon the best information available to him.

(n). The only information that would be available to the Secretary to determine the basis (cost) the Petitioner had in his labor would be the amount he received each day he sold his labor.

(o). During the year 1987, the Petitioner sold his labor to John Ball & Partners, Mathews Kessler & Assoc., Integrated Design and Neywell, Inc. each day that he worked. For the year 1987 the Petitioner received a total of $ 26,677.00 for the sale of his labor to each of the above named companies. Petitioner had a total basis (cost) of at least $ 26,677.00 in the labor he sold to each of the above named companies.

(p). During the year 1988, the Petitioner sold his labor to John Ball & Partners and Honeywell, Inc. on each day that he worked. For the year 1988 the Petitioner received a total of $ 8,287.00 for the sale of his labor to each of the above named companies. Petitioner had a total basis (cost) of at least $8,287.00 in the labor he sold to each of the above named companies.

(q). During the year 1989, the Petitioner sold his labor to Honeywell, Inc.. on each day that he worked. For the year 1989 the Petitioner received $ 4,121.00 for the sale of his labor to each of the above named companies. Petitioner had a basis (cost) of at least $4,121.00 in the labor he sold to Honeywell, Inc.

RELIEF SOUGHT

WHEREFORE, the Petitioner respectfully requests and lawfully demands that this Court:

A. Dismiss the Commissioner's Notice of Deficiency; and,

B. Declare that the Petitioner is a non-resident alien under the internal revenue laws; or in the alternative,

C. Declare that IRC, §1015(a) would generally establish a presumption that a Man has a basis (cost) equal to or greater than the amount he received for the sale of his labor.

D. Declare that the Respondent has the burden of proof of showing that the Petitioner had a basis (cost) other than a basis (cost) equal to or greater than the amount he received for the sale of his labor; and,

E. Declare that the Petitioner had a basis (cost) equal to or greater than the amount he received for the sale of his labor during the years 1987, 1988 and 1989; and,

F. Issue a written memorandum decision declaring that there was no Deficiency in income taxes; and,

G. Grant such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this _____ day of October, 1994.

WILLIAM I. PRESSLEY
c/o 12009 North 114th Ave
Youngtown, Arizona 85345
Petitioner, In Pro Per

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APPENDIX D
STATUTES, RULES AND MISCELLANEOUS CITATIONS

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APPENDIX D

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Sec. 61. Gross income defined.

(a) General definition. Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, fringe benefits, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

Sec. 83. Property transferred in connection with performance of services.

(a) General rule. If in connection with the performance of services, property is transferred to any person other that the person for whom such services are performed, the excess of --

(1) the fair market value of such property (determined without regard to any restriction other than a restriction which by its terms will never lapse) at the first time the rights of the

person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, over

(2) the amount (if any) paid for such property,

shall be included in the gross income of the person who performed such services in the first taxable year in which the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever is applicable. The preceding sentence shall not apply if such person sells or otherwise disposes of such property in an arm's length transaction before his rights in such property because transferable or not subject to a substantial risk of forfeiture.

Sec 165. Losses.

(b) Amount of deduction. For purposes of subsection (a), the basis for determining the amount of the deduction for any loss shall be the adjusted basis provided in section 1011 for determining the loss from the sale or other disposition of property.

Sec. 1001. Determination of amount of and recognition of gain or loss.

(a). Computation of gain or loss. The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

Sec. 1011. Adjusted basis for determining gain or loss.

(a) General rule. The adjusted basis for determining the gain or loss from the sale or other disposition of property, when acquired, shall be the basis (determined under section 1012 or other applicable sections of this subchapter and subchapters C (relating to corporate distributions), and P (relating to capital gains and losses)), adjusted as provided in section 1016.

Sec. 1012. Basis of property -- cost.

The basis of property shall be the cost of such property, except as otherwise provided in this subchapter and subchapter C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses). The cost of real property shall not include any amount in the respect of real property taxes which are treated under section 164(d) as imposed on the taxpayer.

Sec. 1015. Basis of property acquired by gifts and transfers to trust.

(a) Gifts after December 31, 1920. If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that if such basis (adjusted for the period before the date of the gift as provided in section 1016) is greater than the fair market value of the property at the time of the gift, then for the purpose of determining loss the basis shall be such fair market value. If the facts necessary to determine the basis in the hands of the donor or the last preceding owner are unknown to

the donee, the Secretary shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Secretary finds it impossible to obtain such facts, the basis in the hands of such donor or last preceding owner shall be the fair market value of such property as found by the Secretary as of the date or approximate date at which, according to the best information that the Secretary is able to obtain, such property was acquired by such donor or last preceding owner.

Rules of Practice and Procedure
UNITED STATES TAX COURT

Rule 40. Defenses and Objections Made by Pleading or Motion.

Every defense, in law or fact, to a claim for relief in any pleading shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion: (a) lack of jurisdiction, and (b) failure to state a claim upon which relief can be granted. If a pleadings sets forth a claim for relief to which the adverse party is not required to file a responsive pleading, then such party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting failure to state a claim on which relief can be granted, matters outside the pleading are to be presented then motion shall be treated as one for summary judgment and disposed of as provided in Rule 121, and the parties shall be given an opportunity to present all material made pertinent to a motion under Rule 121.

TEXT OF P.L. 67-98, CHAPTER 136, § 202(a)(2) 42 STAT 229

SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal or mixed, acquired after February 28, 1913, shall be the cost of such property; except that--

* * *

(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner. In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sole or other disposition thereof shall be the faire market price or value of such property at the time of such acquisition.

TEXT OF COMMENT ON § 202(a)(2) OF REVENUE ACT OF 1921 FROM SENATE REPORT 275, PAGE 10-11

An essential change, however, is made in the case of property acquired by gift. No explicit rule is found in the present statute for determining gain or loss resulting from the sale of such proper, but the Treasury Department has held that the proper basis for such

determination is the fair market price or value of such at the time of its acquisition by the donee. This rule has been the source of serious abuse. Taxpayers who have property the value of which has increased, give such property to wives or relatives, by whom it may be sold without taxation of the increase in value which took place with the property was owned by the Donor. The proposed bill, in paragraph (2) of subdivision (a), provides a new and just rule, namely, that in the case of property acquired by gift after December 31, 1920, the basis for computing gain or loss is the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. This means that if the property cost the donor $50, and at the time it was given to the donee it was worth $100, for which amount it is sold by the donee, the income of the donee would be $50 instead of nothing as under the present law.